Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1008

MINDA SATTERWHITE, ET AL.,
Petitioners,

v.

CITY OF GREENVILLE, TEXAS,
Respondent.

RESPONDENT CITY OF GREENVILLE, TEXAS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondent, the City of Greenville, Texas, respectfully submits its response to the application for Writ of Certiorari to the United States Court of Civil Appeals for the Fifth Circuit.

SUMMARY OF ARGUMENT

The petition for Writ of Certiorari should be denied for at least two reasons. First, the opinion of the Court of Appeals is in conformity with the opinions of this Court,

and indeed the result obtained was mandated by this Court's opinion in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977). This Court therein refused to permit certification of a class after it had been judicially determined that the representative was not a member of the putative class — which was the identical result reached by the Fifth Circuit Court of Appeals and which result is sought to be overturned by the requested writ.

Secondly, while there may be some conflict within the circuits as to what to do with an uncertified class whose purported representatives have been judicially determined to not be members of the class, there is no conflict as to whether the relief which Petitioner seeks is available to her. Petitioner seeks here — and sought below — a hearing on the question of whether or not to certify a class with herself as the class representative; all of the Courts of Appeals who have spoken are in agreement that this relief should be denied.

ARGUMENT

THE RESULT REACHED BY THE COURT OF APPEALS IS IN ACCORD WITH PRIOR DECISIONS OF THIS COURT

Far from conflicting with the opinions of this Court, the action taken by the Court of Appeals is in accord with and is mandated by the opinion of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977). The single most important fact now known is that Minda Satterwhite was not a victim of discriminatory practices by the City of Greenville, Texas. She is the one person who has been judicially determined not to be a member of the class she seeks to represent. She is, therefore, not

a proper class representative under Fed. Rule Civ. Pro. 23(a). This case now stands in the same factual setting as *Rodriguez* stood when reviewed by the appellate courts: there no class had been certified and the named plaintiffs, after trial, had been determined to have not been victims of discrimination. This Court held in *Rodriguez* that where no class had been certified and where the named plaintiffs' claims had been found to be meritless, those plaintiffs could not be class representatives, for "a class representative must be a part of the class and 'possess the same interest and suffer the same injury' as the class members." 431 U.S. at 403. Paraphrasing *Rodriguez,*

> [Minda Satterwhite] could have suffered no injury as a result of the alleged discriminatory practices, and [was] therefore, not eligible to represent a class of persons who did allegedly suffer injury.

The *Rodriguez* opinion indicates that the time to look at the question of whether the named plaintiff is a proper class representative is at the time of class certification — based on all of the facts known to the court at the time of that certification. Class certification in this case cannot happen yesterday or the day before or on February 4, 1975. It can only happen in the future. At that point, the court will know — as it has already determined — that Minda Satterwhite is not a proper class representative.

Plaintiff claims that the opinion of the Court of Appeals conflicts with this Court's opinions in *Coopers and Lybrand v. Livesay,* _____ U.S. _____, 57 L.Ed.2d 351 (1978) and *Gardner v. Westinghouse Broadcasting Co.,* _____ U.S. _____, 57 L.Ed 2d 364 (1978). Those cases hold that a district court order denying class certification is not appealable as a final order, but rather may be reviewed only after judgment on the merits. Those cases did not purport to and did not overrule *Rodriguez.* This Court in

Coopers & Lybrand held "that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not sufficient reason for considering it a 'final decision' within the meaning of § 1291" 57 L.Ed.2d at 363. Likewise the fact that a district court may have acted prematurely in denying class certification is not sufficient reason for holding a hearing on class certification after the district court's action is vindicated by a judgment against the individual plaintiff. Just as denial of class certification cannot preempt 8 U.S.C. § 1291, it cannot eviscerate Rule 23(a).

In any event, the Court of Appeals' opinion below did not say that the district court's order denying class certification in this matter was not reviewable on appeal. It simply held that no class could now be certified with Minda Satterwhite as the class representative. There being no other class representatives available, it was ordered that the case be dismissed.

THE COURTS OF APPEALS ARE IN AGREEMENT THAT THE RELIEF PETITIONER SEEKS IS NOT AVAILABLE

The second important point is that there is no conflict among the Courts of Appeals as to whether the relief which the petitioner would seek from this Court and for which she prayed in the Court of Appeals is available. The relief which the petitioner seeks and has always sought is a hearing on the maintainability of this action as a class action with the petitioner as a class representative. The Court of Appeals for the Fourth Circuit in *Goodman v. Schlesinger,* 584 F.2d 1325 (1978) would not have granted such relief to petitioner. In that case, the opinion remanded the cause to the district court to hold on its docket for a reasonable time in order to let some other potential class

representative step forward to pursue the action. It did not remand the case to the district court to conduct a hearing on the question of whether a class action could be maintained with the plaintiff who had been judicially determined not to be a member of the class as a representative. The remedy fashioned in *Goodman* is a remedy which petitioner has not sought below and does not seek here. The petitioner seeks to be the class representative. That is a result which the opinions of this Court do not condone, and a result which no opinion of any Court of Appeals permits.

The interesting question as to whether there can be a cause on the docket of a federal district court in which there is a known defendant and a known allegation but no known plaintiff has thus not arisen here. That is the question upon which there may be disagreement between the Fifth and Fourth Circuit Courts of Appeals (with the Sixth and Ninth Circuits siding with the Fifth, see *Shipp v. Memphis Area Office, Tennessee Department of Employment Security,* ____ F.2d ____, 14 Empl. Prac. Dec. ¶8520 (6th Cir. 1978) and *Vun Cannon v. Breed,* 565 F.2d 1096 (9th Cir. 1977)). The Court of Appeals for the Fourth Circuit seems to think this is a permissible status for a case. If this question had presented itself in this case, we would urge that such a proposition is contrary to the limitation in Article III of the United States Constitution that the federal judicial power extend only to cases or controversies: A case with no plaintiff is no case; a controversy between no one and someone is no controversy. *Vun Cannon v. Breed,* 565 F.2d 1096 (9th Cir. 1977). However, that question is not present in this case.

PRAYER

In light of the fact that the Court of Appeals was correct in its determination; in light of the fact that the Court of Appeals' decision is in accord with — and mandated by — previous decisions of this Court; in light of the fact that the Courts of Appeal are in agreement on the point that the relief which the Petitioner seeks and has sought below is not available to her, Respondent prays that the petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Minda Satterwhite be denied.

Respectfully submitted,

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& Blumenthal
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CERTIFICATE OF SERVICE

I, John Andrew Martin, hereby certify that three (3) true and correct copies of the foregoing have been on this the 12th day of January, 1979, deposited in the United States Mail, first class, postage prepaid, to Larry R. Daves, Daves, McCabe & Crews, P. O. Box 1115, Tyler, Texas, 75710, attorney for petitioner.

All parties required to be served have been served.

JOHN ANDREW MARTIN